No. 76-859

In the Supreme Court of the United States

OCTOBER TERM, 1976

HAZELWOOD CHRONIC & CONVALESCENT HOSPITAL, INC., d/b/a KEARNEY STREET CONVALESCENT CENTER, PETITIONER

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court is not reported (Pet. App. A1-A7). The opinion of the court of appeals (Pet. App. A8-A21) is reported at 543 F. 2d 703.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1976. The petition for a writ of certiorari was filed on December 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary may, by regulation, provide for the recovery of excess depreciation taken by a provider of services who leaves the Medicare program.

STATUTE AND REGULATION INVOLVED

The pertinent statutory and regulatory provisions are set forth at Pet. App. A22-A24.

STATEMENT

Part A of Subchapter XVIII of the Social Security Act, as added, 79 Stat. 291, and amended, relating to the Medicare program, 42 U.S.C. (1970 ed. and Supp. V) 1395c to 1395i-2, is designed to provide basic protection against the costs of hospital services for eligible aged or disabled individuals. 42 U.S.C. (Supp. V) 1395c. Participating hospitals, the providers of medical services paid for by the Medicare program, do not charge Medicare patients directly but instead are reimbursed by the Secretary of Health, Education, and Welfare. 42 U.S.C. (and Supp. V) 1395i, 1395cc. The providers are entitled to reimbursement for all "reasonable costs" actually incurred in connection with furnishing hospital services to Medicare beneficiaries. 42 U.S.C. (Supp. V) 1395f(b), 1395g. "Reasonable costs" are to be determined in accordance with regulations establishing the method or methods to be used, and the items to be included, in determining such costs. 42 U.S.C. (Supp. V) 1395x (v)(1)(A). Such regulations may provide for suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive. 42 U.S.C. (Supp. V) 1395x(v)(1)(A)(ii).

A provider is reimbursed on an interim, pre-audit basis not less often than monthly, based upon billings submitted to the Secretary that are determined by the latter, on the basis of the information then available to him, to constitute the "reasonable cost" of providing services covered under the Act. 42 U.S.C. (Supp. V) 1395g. At the close of the provider's fiscal year, it submits a cost report, and the

Secretary then determines by audit the actual amount of reimbursement to which the provider is entitled for that year. 20 C.F.R. 405.451(b)(1). If it is determined that the interim payments were more or less than the amount to which the provider is entitled, an adjustment may be made in the current interim payments to the provider in order to recoup or repay the difference involved. 42 U.S.C. (Supp. V) 1395g; 20 C.F.R. 405.454.

Among the reimbursable costs to providers is depreciation of their assets. Prior to August 1, 1970, providers were entitled to compute depreciation charges by means of either the "straight-line" or the "accelerated" method. See 20 C.F.R. 405.415 (1970). On August 1, 1970, a new regulation, first proposed by the Secretary on February 5, 1970 (35 Fed. Reg. 2593) became effective. 35 Fed. Reg. 12330. This regulation, now 20 C.F.R. 405.415, provides that the accelerated method of depreciation can be utilized by providers for assets acquired after August 1, 1970, only in certain limited circumstances. 20 C.F.R. 405.415(a)(3)(ii), (iii). In addition, the regulation states that if a provider that utilized the accelerated method of depreciation terminates its participation in the program, the excess of reimbursable cost paid utilizing the accelerated depreciation methods, over the reimbursable cost which would have been determined and paid using the straight-line method, will be recovered as an overpayment received by the provider during its participation in the program. 20 C.F.R. 405.415(d)(3).

The purpose of the amendment was to make an adjustment, as required by 42 U.S.C. (Supp. V) 1395x (v)(1)(A)(ii), to prevent excessive reimbursements. If such an adjustment were not made, providers that leave the Medicare program after utilizing the accelerated method for less than the estimated life of the asset would have received a

greater total reimbursement than if they had utilized the straight-line method of depreciation for the same period. See *Springdale Convalescent Center* v. *Mathews*, 545 F. 2d 943, 953-954, 956 (C.A. 5).

Petitioner was a provider under the Medicare Program from 1967 until December 1971, and had been reimbursed for depreciation on the basis of the accelerated method. When petitioner withdrew from the program, the fiscal intermediary, which handles the day-to-day administration of the program for the Secretary (42 U.S.C. (and Supp. V) 1395h), determined that use of the accelerated method of depreciation had provided petitioner with $24,678 more in reimbursement than it would have received had the straight-line method been used. By the time this determination had been made, petitioner had rejoined the Medicare program, and the intermediary sought to recover the excess payments by reducing the monthly reimbursements currently being made to petitioner.

Petitioner filed this action in the United States District Court for the District of Oregon, seeking a declaratory judgment that the regulation providing for recapture of accelerated depreciation was not authorized by statute and was unconstitutional, a permanent injunction against enforcement of the regulation, and recovery of the amounts that had been withheld from petitioner pursuant to the regulation. The district court held that the regulation denies due process insofar as it authorizes recapture of reimbursement for depreciation charges taken prior to the beginning of the year in which it was promulgated (Pet. App. A6-A7). The court further held, however, that the regulation was valid as applied to depreciation charges taken after December 1969 (Pet. App. A7). The court enjoined the Secretary from applying the regulation to petitioner for the period preceding January 1, 1970, and awarded a money judgment for the amounts that had been withheld with respect to the period prior to that date.

On the government's appeal,[1] the court of appeals reversed and remanded for entry of judgment in favor of the Secretary (Pet. App. A8-A20). The court held that the district court had correctly asserted jurisdiction to hear the case under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (Pet. App. A13-A16). But the court of appeals further held that the regulation was a valid exercise of authority under the Act, reasoning that 42 U.S.C. (Supp. V) 1395x(v)(1)(A)(ii) authorizes suitable retroactive corrective adjustments of the kind made here (Pet. App. A17-A18). The court of appeals also rejected petitioner's contention that the regulation denies due process.

DISCUSSION

1. The regulation permitting recapture of excess depreciation charges is reasonable and was correctly sustained by the court of appeals. Accelerated and straight-line methods of depreciation each allocates the entire cost of an asset over its useful life; a provider who continues in the Medicare program for the useful life of a facility would, over time, receive the same reimbursement for depreciation under either method of accounting. But providers who elect to be reimbursed on the basis of the accelerated method of depreciation and then withdraw from the Medicare program during the useful life of the facility will have received inflated reimbursements, because the accelerated method permits a disproportionate percentage of the cost of an asset to be charged off during the earlier years of the asset's life. The regulation providing for the recapture of the reimbursements attributable to the amount by which accelerated depreciation exceeded straight-line depreciation serves the permissible purpose of preventing such

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[1]Petitioner did not appeal from that portion of the judgment of the district court adverse to it.

providers from retaining the inflated portion of their reimbursements.[2] This result is authorized by the statutory delegation to the Secretary of the responsibility for determining the providers' actual "reasonable costs" and making retroactive adjustments. 42 U.S.C. (Supp. V) 1395x(v).[3]

a. Petitioner incorrectly contends (Pet. 10-16) that the Secretary's statutory authority to provide for retroactive adjustments relates only to current fiscal periods. The statute expressly states that the Secretary is authorized to "provide for the making of suitable retroactive corrective adjustments where, for a provider of services *for any fiscal period*, the aggregate reimbursement produced by the methods of determining costs proves to be * * * excessive." 42 U.S.C. (Supp. V) 1395x(v)(1)(A)(ii) (emphasis added).[4]

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[2]Petitioner complains (Pet. 13-14) that the regulation does not affect all providers. It did not have to. The Secretary's regulation pertained to a particular "method[ ] of determining costs" (42 U.S.C. (Supp. V) 1395x(v)(1)) employed only by some providers. The correction provided by the regulation extended only to those among that group of providers as to whom the method had produced excessive reimbursement over the period during which the asset subject to depreciation was used in the Medicare program. This was fully consistent with the statute, which permits "suitable retroactive corrective adjustments" where reimbursements produced by "the methods of determining costs" prove excessive (*ibid.*).

[3]Contrary to petitioner's claim (Pet. 13), the Secretary was not required to publish specific findings before promulgating the recapture regulation. See *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 185-186. Furthermore, ample opportunity for public comment on the factual basis of the regulation was provided during the 6 months between publication of the proposed regulation and final promulgation.

[4]In contending that only current adjustments are permitted, petitioner relies (Pet. 11-12, n. 7) upon legislative history that relates to adjustments made to rectify overpayments or underpayments in the interim payments that are made during the course of a single fiscal year under 42 U.S.C. (Supp. V) 1395g, not to retroactive adjustments made under 42 U.S.C. (Supp. V) 1395x(v). See Hearings on Reimbursement Guidelines for Medicare, before the Senate Committee on Finance, 89th Cong., 2d Sess. 119-120 (1966).

That statutory language plainly anticipates that retroactive adjustment can be made in past fiscal periods, and it places no limitation on how distant in time those periods may be; it specifically permits adjustment to be made with respect to "any fiscal period."[5]

b. The recapture regulation challenged by petitioner has been sustained by every court of appeals that has considered it. In addition to the court below, the First and Fifth Circuits also have upheld the regulation. *Adams Nursing Home of Williamstown, Inc.* v. *Mathews*, No. 76-1212, decided February 2, 1977 (C.A. 1); *Springdale Convalescent Center* v. *Mathews, supra.*

Petitioner's assertion to the contrary (Pet. 8-9) notwithstanding, there is no conflict. The recapture regulation was not at issue in the cases upon which petitioner relies. Moreover, the courts in *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F. 2d 663, 669 (C.A. 2), and *Whitecliff, Inc.* v. *United States*, 536 F. 2d 347, 352 (Ct. Cl.), petition for a writ of certiorari pending, No. 76-1188, held that the statute not only permits but requires the Secretary to make retroactive corrective adjustments to past fiscal years; those courts therefore almost certainly would have sustained this regulation if it had been before them.[6]

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[5]Petitioner's suggestion (Pet. 12) that the Fifth Circuit reads the statute as limiting readjustments to the immediately preceding year is incorrect. That court has expressly repudiated any such reading. *Springdale Convalescent Center* v. *Mathews, supra*, 545 F. 2d at 953 n. 9, 954.

[6]Although the Fifth Circuit in *Mt. Sinai Hospital of Greater Miami, Inc.* v. *Weinberger*, 517 F. 2d 329, 335 (C.A. 5), certiorari denied, 425 U.S. 935, suggested in *dictum* that adjustments might be limited to the immediately preceding fiscal year, that *dictum* was disapproved in *Springdale Convalescent Center* v. *Mathews, supra*, 545 F. 2d at 953 n. 9, 954. The regulation challenged here was sustained in *Springdale Convalescent Center;* it was not at issue in *Mt. Sinai Hospital of Greater Miami.*

2. Petitioner further contends (Pet. 16-19) that the operation of the recapture regulation denies due process. The court of appeals correctly rejected this contention. See also *Springdale Convalescent Center* v. *Mathews, supra; Adams Nursing Home of Williamstown, Inc.* v. *Mathews, supra.*

At the time petitioner voluntarily undertook the responsibilities of a provider of Medicare services, it was on notice that the statute authorized retroactive adjustments in payments to the extent necessary to correct excessive reimbursements. Petitioner therefore cannot claim that it was unfairly surprised by the Secretary's proposal to promulgate regulations providing for such adjustments. Cf. *Welch* v. *Henry,* 305 U.S. 134, 149-150. Furthermore, petitioner had notice of the proposal approximately six months before the regulation was promulgated; if during that time petitioner had concluded that the conditions to be imposed by the regulation were unduly onerous, petitioner could have withdrawn from the Medicare program. Since petitioner did not attempt to withdraw (Pet. App. A19), but rather voluntarily continued in the program with knowledge of the terms governing its participation, including the recapture regulation, it cannot be said that the subsequent application of that regulation to petitioner was so harsh or oppressive as to deny due process. See *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 315-316.

3. The judgment of the court of appeals has an alternative basis. The court acknowledged that jurisdiction under 28 U.S.C. 1331 was barred in this case by 42 U.S.C. 405(h) (Pet. App. A11-A13).[7] But the court concluded that jurisdiction

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[7]The question whether 42 U.S.C. 405(h) bars review of provider reimbursement disputes is now before this Court in *United States* v. *Whitecliff, Inc.*, petition for a writ of certiorari pending, No. 76-1188. But since the courts below asserted jurisdiction and disposed of petitioner's claims on the merits and, for the reasons set forth above (pp. 5-8, *supra*), those claims do not themselves warrant review, this case need not be held pending disposition of *Whitecliff.*

was conferred by the Administrative Procedure Act (Pet. App. A13-A16). That conclusion was erroneous. *Califano* v. *Sanders,* No. 75-1443, decided February 23, 1977. Accordingly, the courts below appear to have lacked jurisdiction to consider this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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